No. 17-8151

IN THE

Supreme Court of the United States

RUSSELL BUCKLEW,

Petitioner,

v.

ANNE PRECYTHE, *ET AL.*,

Respondents.

On a Writ of Certiorari to the
Eighth Circuit Court of Appeals

BRIEF OF FORMER JUDGES AND PROSECUTORS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF *AMICI CURIAE*[1]

INTEREST OF THE *AMICI*

Amici are former federal and state appellate judges, prosecutors, and law enforcement officers.[2] They are leaders in the community and deeply familiar with the criminal justice system. They include stakeholders—former trial and appellate judges, state Attorneys General, United States attorneys, assistant United States attorneys, and elected prosecutors and their deputies—from every stage of the criminal justice process. They are Democrats and Republicans, conservatives, and liberals.

Notwithstanding their diverse backgrounds, *Amici* share a strong interest in the fairness and public legitimacy of the criminal justice system. Their collective centuries of criminal justice experience has taught them that system works best when the processes designed to make it function are applied evenhandedly. The need to do so is particularly acute in cases where the stakes are highest.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Petitioner Russell Bucklew has a rare medical condition, cavernous hemangioma, which presents

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[1] *Amici* certify that no party or party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for both parties received timely notice of *Amici*'s intent to file this brief and have provided blanket consent to filing of any amicus curiae brief in support of either party or neither party.

[2] A complete list of *Amici* appears as an addendum.

unique risks that his execution by lethal injection will cause excruciating pain. In litigating his case before the lower courts, Petitioner faced a series of unusual procedural barriers, none of which have a sound basis in law and each of which were at odds with the rigorous adversarial testing required in any case, but especially where the death penalty is concerned.

Refusing to conduct an evidentiary hearing, the district court assumed the medical competence of those conducting the execution without ever identifying those persons or their qualifications. The court barred discovery on the qualifications of the execution team, and barred counsel from even making a proffer about the need for discovery. These deprivations conspired to render it virtually impossible for Petitioner to plead his case and submit it to the kind of adversarial testing that is at the heart of our system of justice.

This case embodies the problems plaguing other as-applied challenges to lethal injection protocols: courts, when presented with substantial claims about the state's ability to carry out an execution in light of the prisoner's particular medical infirmities, instead of facing them head on, construct novel barriers to fairly adjudicating them. Instead of ensuring reliability via well-established procedural norms, courts in these cases have all too often erected novel procedural obstacles to fully addressing the claims. The opposite should be true. Where inmates with unique medical conditions make substantial showings that an execution process is sure or very likely to cause needless suffering, courts should make every effort to ensure that the parties are able to litigate the claims.

The results have been gruesome. Inmates have had their veins "blow out," they have writhed on the gurney for hours before dying, and in at least three instances, the execution had to be called off because the state and the courts had not heeded the defendant's warnings that the execution could not be humanely carried out in light of a particular medical condition.

Where a petitioner demonstrates that he suffers from a medical or other condition, present through no fault of his own, a court should be required to permit full fact-finding and adversarial testing to determine whether the State's execution protocol would produce a high risk of extreme pain relative to that experienced by a healthy inmate.

In the course of adversarial testing (including discovery related to administration of the protocol in light of the prisoner's infirmities and an evidentiary hearing) if the prisoner has made such a showing, it should be the State's burden to provide an alternative method that would eliminate any undue risk. In light of the procedural irregularities in the as-applied challenges, the Court should take special care to explain in some detail the process that applies once a plaintiff has made a colorable claim for relief under this standard. Doing so will ensure that the procedural fairness upon which we all rely will also reach the cases where the stakes are highest.

ARGUMENT

I. ROBUST ADVERSARIAL TESTING IS FUNDAMENTAL TO THE PROPER FUNCTION OF OUR SYSTEM OF JUSTICE, PARTICULARLY WHERE THE STAKES ARE HIGHEST.

The purpose of adversarial testing is to discover the truth. Where the stakes are highest, the mechanisms for conducting that testing must be robustly enforced, not thrown out the window. Ad hoc departures from the rules—rules that are designed to protect litigants and to ensure the reliability of proceedings—should be avoided absent a compelling need to avoid an injustice. This principle applies with greatest force to cases concerning capital punishment, where the stakes could not be higher.

A. Procedural Protections Are Designed To Produce Just Results.

Amici's collective experience, spanning hundreds of years, has taught us that the truth will most reliably and completely emerge through adversary proceedings between two equally armed advocates zealously asserting their strongest positions. "The adversary system stands with freedom of speech and the right of assembly as a pillar of our constitutional system." Geoffrey Hazard, *Ethics of the Practice of Law*, 120-21, 123 (1978). Just as adversarial processes are at the core of the reliable legal search for truth, so too are they core to the equitable administration of justice. "[Our legal] system assumes that adversarial testing will ultimately advance the public interest in truth and fairness." *Polk County v. Dodson*, 454 U.S. 312, 318 (1981).

A core element of our system is examining the witnesses in opposition:

> A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.

In re Oliver, 333 U.S. 257, 273 (1948). The opportunity to confront the evidence against oneself is considered a "bedrock procedural guarantee," *Crawford v. Washington*, 541 U.S. 36, 42 (2004), and "the greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 174 (1970).

In addition to examining the witnesses in opposition, being permitted to present one's own case for relief is a fundamental premise of our court system. Providing an interested party with the chance "to contest [the case against him] and produce evidence in rebuttal" is fundamental to ensuring that "honest error or irritable misjudgment" do not interfere with the decision making process. *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970) (internal quotation omitted). "The right to offer testimony of witnesses" is necessary so the factfinder "may decide where the truth lies" and "is a fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 19 (1967).

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). Access to counsel stems from the "noble

ideal" of "assur[ing] fair trials before impartial tribunals in which every defendant stands equal before the law." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). The right to counsel plays a crucial role in the adversarial system . . . since access to counsel's skill and knowledge is . . . critical to the ability of the adversarial system to produce just results." *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

The Federal Rules of Civil Procedure and Evidence are designed to effectuate these protections. The Rules of Civil Procedure provide litigants with powerful tools to obtain relevant information from their opponents. They allow parties to make inquiries of witnesses and each other. Fed. R. Civ. P. 30, 31, 33. The rules provide for production of documents and even for mental and physical examinations. Fed. R. Civ. P. 34, 35. They also permit the parties to focus the litigation by obtaining admissions from each other. Fed. R. Civ. P. 36. And they provide for a timeline and process for undertaking these tasks. Fed. R. Civ. P. 26.

The Federal Rules of Evidence provide for presentation of expert testimony, impeachment of witnesses, and the scope of competent evidence in general. Fed. R. Evid. 402, 601, 608, 702. Both sets of rules represent a careful accounting for the rights and interests of parties and non-parties, as well as the need for adversarial testing in pursuit of the truth.

B. Where The Death Penalty Is At Issue, The Need For Reliability Demands Heightened Procedural Protections.

Due process and the Eighth Amendment both require heightened reliability—and attendant procedural protections—when the stakes are highest.

"When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (opinion of Stewart, J.). "[B]ecause there is a qualitative difference between death and any other permissible form of punishment, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment[.]" *Zant v. Stephens*, 462 U.S. 862, 885 (1983) (internal quotation omitted).

Consistent with this principle, the Court has established a wide array of procedural protections to ensure that capital cases are reliably adjudicated. *See, e.g., Buck v. Davis*, 137 S. Ct. 759, 778 (2017) (death sentenced inmate entitled to re-open his habeas case under Rule 60(b) where race likely played a role in deciding whether to sentence the inmate to death); *Brumfield v. Cain*, 135 S. Ct. 2269, 2273 (2015) (death sentenced inmate making colorable claim of intellectual disability entitled to evidentiary hearing to prove claim); *Morgan v. Illinois*, 504 U.S. 719, 729-30 (1992) (capital defendant entitled to conduct voir dire of jury venire on views about capital punishment); *Mills v. Maryland*, 486 U.S. 367, 373-75 (1988) (defendant entitled to have each juror individually consider mitigating value of evidence presented at capital sentencing proceeding).[3] Courts

[3] In non-capital cases as well, courts have taken pains to ensure that their procedures do not work injustices, permitting equitable exceptions to rules that would otherwise foreclose relief. *See Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017) (providing exception to the "no-impeachment rule" where a juror made clear and explicit statements indicating racial animus was a motivating factor in the vote to convict); *Martinez v. Ryan*, 132 S. Ct. 1309, 1315 (2012) (excusing procedural

have an obligation not only to assure strict adherence to the law, but to act equitably. The procedural protections afforded capital defendants reflect the need for reliability where nothing less than the litigant's life is on the line.

Courts must balance the competing obligations to act equitably and to predictably uphold the law. "[W]e have followed a tradition in which courts of equity have sought to 'relieve hardships which, from time to time, arise from a hard and fast adherence' to more absolute legal rules, which, if strictly applied, threaten the 'evils of archaic rigidity.'" *Holland v. Florida*, 560 U.S. 631, 649 (2010) (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944)). "[E]quitable procedure" grants courts the "flexibility" which is "necessary to correct . . . particular injustices." *Hazel-Atlas Glass Co.*, 322 U.S. at 248. In the context of deciding whether to toll the statute of limitations in the Antiterrorism and Effective Death Penalty Act (AEDPA) based on attorney misconduct, the Court explained that extraordinary circumstances may warrant tolling to avoid having a habeas corpus case dismissed, resulting in no federal review of the capital defendant's constitutional claims. *Id.* Where the stakes are highest, courts ensure that departures from the rules err on the side of ensuring justice is served.

A state's interest in "avoiding improper delay, expense, complexity, and interference with [its] interest in the 'finality' of its own legal processes" are

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default of federal habeas corpus claim of ineffective assistance of counsel where state post-conviction counsel was ineffective for failing to raise the claim).

often weighed against the need for equitable relief. However, states have no finality interest in a "flawed" outcome. *Buck*, 137 S. Ct. at 779.

Regardless, "ad hoc departure" from the rules and processes normally that govern cases should be avoided in order to "reduce uncertainty, avoid unfair surprise, minimize disparate treatment of similar cases, and thereby help all litigants, including the State, whose interests in 'finality' such rules often further." *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996). And in the context of capital cases, the gravity of the proceedings strongly favors procedural solicitude to the inmate whose life is at stake. *Mathews v. Eldridge*, 424 U.S. 319, 335-36 (1976) (requiring assessment of the "private interest that will be affected by the official action" to determine the extent of process due).

II. IN AS-APPLIED CHALLENGES TO LETHAL INJECTION PROTOCOLS, ADVERSARIAL TESTING IS REQUIRED TO ENSURE THAT PLAINTIFFS ARE NOT SUBJECTED TO UNNECESSARY TORTURE.

As-applied challenges are inherently case-specific. The plaintiff-specific nature of such challenges heightens the need to make a detailed showing. Relatedly, the need for plaintiffs to access the courts' factfinding tools is greater in as-applied challenges. Unfortunately, the opposite has been the norm. In case after case, the courts have erected unusual procedural barriers that undermine plaintiffs' ability to effectively plead and prove as-applied challenges to lethal injection procedures. The results have been gruesome displays that have no place in civilized society.

A. Challenges to the Implementation of Lethal Injection in Light of a Prisoner's Unique Medical Conditions Require Specific Factual Development.

In terms of facial challenges to lethal injection protocols, "*Baze [v. Rees*, 553 U.S. 35 (2008)] [appeared to have] cleared any legal obstacle to use the most common three-drug protocol that had enabled States to carry out the death penalty in a quick and painless fashion." *Glossip v. Gross*, 135 S. Ct. 2726, 2733 (2015). However, two obstacles soon emerged, one broad and one narrow.

The broader obstacle, inapplicable here, has to do with procurement of lethal injection drugs by the states. As pharmaceutical companies learned that their products were being used in executions, they began using their distribution contracts to exclude their use in executions.[4] At the same time, the laws of the European Union prohibited European manufacturers from selling their drugs for use in executions. *See* Ty Alper, *The United States Execution Drug Shortage: A Consequence of Our Values*, 21 Brown J. of World Affairs 27, 28 (2014). These twin developments have made it difficult to obtain drugs and, broadly, to carry out executions. *See, e.g.*, Order, *Alvogen v. State of Nevada, et al.*, A-18-77312-B (Clark County, Nev. July 11, 2018) (granting tempo-

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[4] The corporate opposition to involvement in executions has a historical prologue. Thomas Edison used the controversy around capital punishment to antagonize his competitor, George Westinghouse. Michael Rosenwald, *"Great God, He Is Alive!" The First Man Executed By Electric Chair Died Slower Than Thomas Edison Expected*, Washington Post (Apr. 28, 2017).

rary restraining order halting execution as sought by drug manufacturing company alleging fraud and reputational harm related to procurement and use of its products in an execution). This impediment, the difficulty some states are having obtaining execution drugs, is not at issue here.

The other, much narrower, obstacle *is* at issue. There are a handful of inmates who have rare medical conditions that make their execution via lethal injection much more likely to create a substantial risk of extreme pain. Some of these inmates, such as Petitioner, have raised challenges based on their conditions.

These challenges are not per se challenges to the death penalty or even to lethal injection. They are challenges to the implementation of lethal injection in light of the specifics of their unique medical condition. By their very nature, challenges to protocols based on these medical conditions will be unique to the inmate asserting them.

And depending on the condition at issue, information about a state's protocol may become relevant. For example, where the condition in question concerns a problem with veins, knowing the background and experience of those seeking to obtain intravenous access would be important. *See* David Mbamalu & Ashis Banerjee, *Methods of Obtaining Peripheral Venous Access In Difficult Situations*, 75 Postgraduate Med. J. 459, 459 (1999).

For as-applied challenges, the showing necessary to establish a claim of cruel and unusual punishment will involve asserting facts specific to the challenger as well as information about the process that goes

beyond the plain language of the protocol in question.

Turning to the context of this case, even assuming that Missouri's protocol is followed precisely, without any mistake or error, the risk of severe pain for Bucklew exists because the protocol was not crafted with his unique and rare medical circumstance in mind. In the lower court, counsel for Bucklew presented uncontroverted evidence that their client's cavernous hemangioma could cause him to choke on his own blood during the administration of Missouri's lethal injection protocol. Counsel for Bucklew made many attempts to discover the specificities of the protocol's machinations relevant to his condition, the preparedness of the execution team and the available accommodations and alternatives should Bucklew's airway become engorged with his own blood. The district court denied access to any of the relevant information.

B. Counsel's Diligent Efforts To Pursue Adversarial Testing Of The Protocol Were Frustrated By The Lower Courts

Petitioner is challenging the method and means of his proposed execution because, due to his rare and uncontested medical condition, it poses substantial risks that: he will suffer through repeated, failed attempts to gain peripheral venous access; the tumor on his uvula will rupture early in the process and he will gag on his own blood as a result; when he is made to lie flat during a cut-down procedure he will have difficulty managing his airway; and (assuming the execution progresses this far) when the lethal drug is administered he will, after he loses the ability to manage his airway, experience a sense of suffocating for several minutes. Brief of Petitioner at

30, *Bucklew v. Precythe*, No. 178151 (July 16, 2018). Despite providing compelling evidentiary support about his condition, Bucklew was repeatedly barred from learning whether the execution team was prepared to address these risks.

In the proceedings below, counsel made efforts to obtain discovery in several categories, including the execution protocol, the chemicals, alternative methods of execution, Correctional Department policies and procedures, and the qualifications and individual experience of the execution team. *See* Order Regarding Scope of Discovery, Joint Appendix at 118, *Bucklew v. Precythe*, No. 178151. The district court permitted limited discovery relating solely to the protocol in place at the time and the chemicals to be utilized in the execution (excluding information about where or how the drugs were obtained). *Id.* at 119-26. The district court denied discovery about the individual execution team members, finding it irrelevant since Bucklew did "not allege that changing the execution team members will significantly decrease the risk of pain and suffering."[5] *Id.* at 124.

The Eighth Circuit affirmed the denial of the discovery request because it assumed that the execution team was qualified under the protocol and, despite having no information about their qualifications, competent to perform their assigned duties. Opinion, Joint Appendix at 854.

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[5] The court prohibited discovery about the individual team members, permitting only general discovery relating to the composition of the team (for example, the category of team member and the number of members on the team). *See* Order Regarding Scope of Discovery, Joint Appendix at 124, *Bucklew v. Precythe*, No. 178151.

In addition to denying discovery of information beyond the protocol itself, the district court erected a further obstacle, prohibiting counsel from even making a proffer about the need for additional discovery. During the course of two prior facial lethal injection challenges, *Ringo et al. v. Lombardi, et al.*, No. 09-4095-BP (W.D. Mo.) and *Zink et al. v. Lombardi, et al.*, Case No. 12-4209-BP (W.D. Mo.), counsel for the group of petitioners (which included Bucklew represented by Attorney Cheryl Pilate) conducted depositions of various execution team members, including telephonic depositions of the execution team doctor.

These depositions are covered by a protective order in the prior cases (which were eventually transferred to the same District Court Judge in this case) and are not available publicly. *See* Plaintiff's Motion for Leave to File *Ex Parte* and Under Seal an Exhibit in Support of Plaintiff's Reply Brief in Support of His Motion to Compel, Joint Appendix at 127-28. Though Attorney Pilate had learned information from these depositions that was "highly relevant" to Bucklew's individual medical challenge, she was not permitted to use that information to advocate for her client, nor was she permitted to even share that information with her co-counsel, hindering their ability to effectively advocate for their client.[6] *Id.* at 128.

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[6] The prior cases (*Ringo* and *Zink*) involved primarily the same cast of characters as in the present suit: Missouri Attorney Cheryl Pilate represented Bucklew, Missouri's Office of Attorney General represented the Department of Corrections, and the District Court Judge Beth Phillips presided. There was one exception: pro bono counsel with the

Attorney Pilate attempted to make a record about the relevance of the depositions on three separate occasions. First, she sought leave to file ex parte a proffer in support of her motion to compel discovery that contained excerpts of the depositions. *Id.* Notably, the filing needed to be ex parte only as to her co-counsel, since the judge and the office of the Attorney General all had possession of the confidential depositions in question.[7] *Id.* Attorney Pilate's motion explained that the depositions were "highly relevant to the present litigation." *Id.* In a text only docket entry, without an accompanying opinion or order, the district court denied counsel's request, inexplicably prohibiting counsel from filing the proffer and, thus, from making a record of the need for discovery. Order Denying Motion to File Document Under Seal, Joint Appendix at 131.

The following month, Attorney Pilate again attempted to rely on the relevant information from the *Ringo* and *Zink* depositions, seeking leave to file a two-page Supplement to Plaintiff's Suggestions in Opposition to Defendants' Motion for Summary Judgment. Both the motion for leave and the proffered supplement were in compliance with the prior protective order as well as the district court's previous text order, and did not include any portion of the depositions. Plaintiff's Motion for Leave to File Supplement to Plaintiff's Suggestions in Opposition,

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firm Sidley Austin, who represent Bucklew in the present case, was not involved in the prior facial challenges.

[7] Though the Missouri Attorney General Chris Koster had lost the election against Joshua Hawley, and Mr. Hawley had staffed his office with many new attorneys, they all were given complete access to the confidential depositions.

Joint Appendix at 811. The Motion for Leave provided that "[g]iven the subject matter of portions of the summary judgment briefing, Plaintiff believes it is prudent to preserve his objection and assert this ground as a further basis for denying summary judgment." *Id.* at 812.

Counsel attached the proffered supplement to the motion for leave, averring that she alone (without input or assistance from her co-counsel) had prepared it. In the supplement, counsel argued that "deposition transcripts would provide relevant, admissible evidence bearing on numerous allegedly undisputed facts raised by defendants, as well as providing additional support for facts asserted by Plaintiff." *Id.* at 814. In the deposition, the doctor had "testified on a variety of subjects relating to the manner of carrying out executions, the potential risks involved, and specific relevant aspects of his background." *Id.* at 814-15.

The court again denied leave to file the pleading, on the grounds that "there is no need to risk confusing the Record in this manner." Order Denying Plaintiff's Motion for Leave to File Supplemental Suggestions in Opposition, Joint Appendix at 816.

After the court granted summary judgment, Attorney Pilate sought permission to share the depositions with her co-counsel in order to appeal the court's decisions prohibiting use of the depositions in the course of the litigation. Plaintiff's Notice of Filing Discovery Dispute Summaries, Joint Appendix at 836. Though it had initially scheduled a teleconference for counsel to present her position on the issue, the court sua sponte cancelled the conference and, instead, issued an order denying counsel's request to share the depositions with her co-counsel. *Id.* The

court found no justification to share the depositions because it had found the individual qualifications of the execution team members to be irrelevant. Order Denying Plaintiff's Request for Access to Depositions Taken in Other Cases, Joint Appendix at 834.

Thereafter, Attorney Pilate filed a two-page memorandum preserving her objection to the court's ruling, which counsel argued constituted a due process violation. Plaintiff's Notice of Filing Discovery Dispute Summaries, Joint Appendix at 838-39. The filing noted that counsel had "scrupulously abided by the protective order" pertaining to the depositions, which had left her "unable to discuss them with her co-counsel or to explain, even in general terms, why lack of access to them has impaired Plaintiff's ability to litigate his due process claim." *Id.* at 838.

The memorandum highlighted the inherent unfairness of the bizarre situation: the one and only party to the litigation that did not have access to the information was co-counsel for Bucklew. In prohibiting pro bono co-counsel for Bucklew from having access to these "highly relevant" materials the district court interfered with counsel's ability to zealously advocate for their client. Additionally, the court's rulings ultimately interfered with the attorney client relationship, by effectively preventing Attorney Pilate from discussing the depositions with her client, because she could not take the risk that he would mistakenly communicate the confidential information to her co-counsel.

In curtailing discovery of new information while precluding counsel from using information she already knew, the district court impeded the adver-

sarial process, effectively stripping Bucklew of important procedural protections.[8] The defense specifically requested discovery of the qualifications of the execution team in order to discover whether the medical members of the execution team were informed as to the details of Bucklew's rare medical condition and medically equipped to manage the execution in light of that condition. That the execution team was qualified under the protocol did not necessarily mean that it was qualified to medically manage Bucklew's condition.

Notably absent in the discovery pertaining to the approved execution protocol was any evidence or indication that the protocol was developed to, in any way, accommodate Bucklew's condition. The medical background and qualifications in the area of cavernous hemangioma of the individual execution team members was and remains of vital import, since the team would be responsible for making in-the-moment decisions during the execution procedure.

As Missouri DOC Director Precythe testified, she was not educated about Bucklew's medical condition and would need to defer to the medical members of the execution team to navigate his particularized issues. Brief of Petitioner at 30, *Bucklew v. Precythe*, No. 178151 (July 16, 2018). The medical team would be permitted to exercise considerable discretion in

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[8] Because he was not permitted to depose the execution team, Bucklew was also unable to question them as to specific details about the administration of the protocol beyond those expressly enumerated. For example, he was unable to ascertain the size of the needles, the constrictive nature of the restraints, or the capability of the gurney to be placed in a seated or partially reclined position.

devising potential contingency plans, perhaps even after the procedure began. These extra-protocol, sub-rosa actions require the team to rely upon its knowledge and experience regarding Bucklew's rare condition. Thus, their knowledge and experience was key.

The district court's refusal to permit discovery on this question hamstrung both counsel and the appellate court in assessing his claim that Missouri's execution protocol would, in light of his rare medical condition, amount to torture.

C. Botched Executions Of Medically Infirm Prisoners Underscore The Need For Adversarial Testing In As-Applied Challenges.

The need for specific fact finding in this area is clear in light of several recent botched executions, where various states' protocols failed to adequately account for the individual medical needs of infirm prisoners. In these cases, the prisoner's unique infirmities resulted in an increased risk of harm and an inability to complete the execution. In each case, last minute modifications were made to address the prisoner's medical complications. These modifications—which were implemented without adversarial testing—did not correct the risk of harm, and, instead, may have actually exacerbated the harm incurred.

Doyle Hamm was scheduled to be executed one month before Petitioner. Prior to the execution, his counsel filed a complaint in federal court arguing that his client's medical condition, which included a diagnosis of and ongoing treatment for lymphatic cancer, created a substantial risk of harm under

Alabama's lethal injection protocol, in part because of increased difficulty finding a vein. Petition for Writ of Certiorari, at 2-3, *Hamm v. Dunn*, 138 S. Ct. 828 (No. 17-7855).

Instead of accepting the full implications of the plaintiff's evidence that his medical condition would render his execution cruel and unusual, the district court and then the Eleventh Circuit Court of Appeals adopted unusual procedural modifications of the protocol. First, the district court prohibited the state from attempting peripheral venous access on Hamm's upper extremities. *See Hamm v. Comm'r, Ala. Dep't of Corr.*, No. 18-10636, 2018 WL 1020051, at *1-*2, *7 (11th Cir. Feb. 22, 2018).

The district court did not address whether central venous access was permissible; though its own expert had concluded that such access would require ultrasound equipment and a specialized medical professional. *Id.* Next, the Eleventh Circuit required the state's experts to submit affidavits directly to that court assuring them that the state would have a doctor involved in the event that central venous access would be required. *Id.* Both federal courts precluded Hamm from presenting evidence challenging the newly modified protocol. *See* Petition for Writ of Certiorari, *Hamm*, 138 S. Ct. 828 (No. 17-7855).

Hamm argued unsuccessfully to this Court that even if peripheral venous access is achieved (per the district court's order), injection of large quantities of the drugs would "blow out" his peripheral veins and result in the infiltration of the lethal drugs in his flesh, rather than his blood system, causing severe and unnecessary pain and suffering. *Id.* at 8.

This Court declined to issue a stay and the execution went forward, almost exactly as predicted by counsel for Hamm. An initial group of executioners attempted to gain IV access on five different locations in Hamm's body. After failing to find a suitable vein, two additional executioners entered the chamber, one carrying an ultrasound device. One placed gel on Hamm's groin while the other "began inserting multiple needles into his groin and pelvis, with repeated jabbing movements, hitting deep into the retropubic area." Bernard E. Harcourt, *The Barbarism of Alabama's Botched Execution*, The New York Review of Books (Mar. 13, 2018). Blood gushed out of Hamm, soaking the pad beneath him. *Id.* Hamm began to pray the execution would succeed, just so the ordeal would come to an end. *Id.*

Hamm's attorney, barred from viewing the chamber, pleaded for a word with the warden when, an hour into the process, it was clear something unusual was afoot. Per the state's protocol, he was denied the opportunity. *Id.* Ultimately, the execution was halted. Instead of further defending the process, the State of Alabama entered a confidential settlement with Hamm, who is alive today.[9] Jordan Rubin, *Alabama Inmate With Cancer Settles Execution Fight*, Bloomberg Law (Apr. 5, 2018).

At least two other attempted lethal injection executions have been brought to a halt where the Depart-

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[9] Exhibiting an apparent moment of an utter lack of insight, the warden in Hamm's case refused to acknowledge that there was a "problem" with the attempted execution. Bernard E. Harcourt, *The Barbarism of Alabama's Botched Execution*, The New York Review of Books (Mar. 13, 2018).

ment of Corrections itself determined that the execution could not be completed. *See* Bernard E. Harcourt, *The Barbarism of Alabama's Botched Execution*, The New York Review of Books (Mar. 13, 2018); Jeva Lange, *Severely Ill Inmate's Execution Called Off Mid-procedure*, The Week (Nov. 17, 2017); Peter Krouse, *Failed Execution of Romell Broom Prompts Efforts to Block Second Attempt*, Cleveland Plain Dealer (Sept. 17, 2009); *see also Francis v. Resweber*, 329 U.S. 459 (1947) (recounting survival of electrocution procedure).

Alva Campbell objected to the application of Ohio's execution protocol based on medical diagnoses, including venous issues similar to those in the present case. Campbell had a history of multiple illnesses and surgeries requiring IV treatment and resulting in compromised veins. He suffered from terminal cancer, emphysema, and respiratory failure, resulting in the removal of a lung. Petition for Writ of Certiorari, *Campbell v. Jenkins*, 138 S. Ct. 466 (2017) (mem.) (No. 17-6688).

Campbell's attorneys argued that his unsuitable veins caused a substantial likelihood of severe pain due to the inability to find access to a vein and that his pulmonary illnesses would cause him to suffer from obstructed breathing and "air hunger." *Id.* at 17, 19-20. His pre-execution attempts to litigate the impact of his medical condition upon Ohio's execution protocol were consistently denied by state and federal courts on procedural grounds. Reply in Support of Petition for Writ of Certiorari, *Campbell v. Jenkins*, 138 S. Ct. 466 (2017) (mem.) (No. 17-6688).

On the day of the scheduled execution, the prison provided Campbell with a pillow, in order to prevent accidental suffocation during the injection procedure.

Executioners then unsuccessfully searched for a vein for twenty-five minutes, repeatedly puncturing Campbell in his arms and leg. Ultimately, Ohio's governor halted the execution. *Id.* Campbell subsequently died of his various ailments. Katherine Lam, *Ohio Inmate Whose Execution Was Called Off Dies of Natural Causes*, Fox News (Mar. 4, 2018).

Ohio's attempted execution of Romell Broom lasted for two hours before the governor called it to a halt. Prison staff spent over an hour attempting to obtain venous access in the arms and legs of Broom. *State v. Broom*, 51 N.E.3d 620, 624 (Ohio 2016). Correctional officers first spent approximately 45 minutes attempting to access veins in Broom's arms. *Id.* After taking a short break, a prison doctor (not included in Ohio's protocol) began attempting to locate veins in Broom's feet and ankles. *Id.* Broom attempted to assist the officers in finding a suitable vein: rolling over on his side, flexing his fingers and rubbing the IV tubes over his veins. Stephen Majors, *Governor Delays Ohio Execution After Vein Troubles*, Associated Press (Sept. 15, 2009). When that was unsuccessful, he rolled over onto his back, crying, and the officers handed him a roll of toilet paper to wipe his face, before patting him on the back and leaving the death chamber. *Id.*; *see also Broom*, 51 N.E.3d at 624. After two hours, the execution team took another break and determined that they could not access a vein. *Id.* In total, Broom sustained at least eighteen puncture marks over his body. *Id.* Ultimately, Ohio's governor granted a one-week reprieve.

During the two hour execution attempt, Broom's attorneys tried repeatedly and unsuccessfully to gain access to their client. Stephen Majors, *Governor delays Ohio Execution After Vein Troubles*, Associat-

ed Press (Sept. 15, 2009). Counsel was informed that attorney access was not permitted once the execution process had begun. *Id.*

In each of these cases, the failure to adequately examine the impact of medical infirmities on the execution protocol resulted in extreme pain and, ultimately, aborted executions. Exacerbating the harm in these cases were the reasonably foreseeable but medically and legally untested ad hoc modifications and contingencies. Though counsel for Campbell and Hamm attempted to examine and avoid these foreseeable consequences, they were estopped from doing so. Ultimately, their clients were tortured while counsel, despite their diligent efforts, stood by unable to intervene. These gruesome and predictable executions were not "innocent misadventures" but rather represent reasonably foreseeable violations of the Eighth Amendment, which, with adequate discovery and testing, could have been avoided.

III. BASIC PROCEDURAL SAFEGUARDS SHOULD APPLY UPON A SUBSTANTIAL THRESHOLD SHOWING THAT AN EXECUTION POSES A HIGH RISK OF EXTREME PAIN WHEN COMPARED TO ITS EFFECT ON A HEALTHY PERSON.

As with other claims of deprivations of constitutional rights, it is the plaintiff's burden to prove the case for entitlement to relief. But, as with other deprivations, there is a preliminary question: what showing is necessary to trigger the robust procedural protections attendant to claims regarding matters of life and death.

A. The Court Should Require a Full and Fair Hearing, Once a Substantial Threshold Showing Has Been Made.

The treatment of as-applied challenges by the lower courts strongly suggests this Court should provide specific guidance on the process by which the lower courts address the merits of such claims. Doing so will allow the adversarial system to work as it should and will prevent the gruesome spectacle of botched executions, narrowly avoided in this case, from repeating itself.

At a minimum, a substantial threshold showing of entitlement to relief ought to entitle the plaintiff to a "fair hearing" consistent with fundamental fairness. *Panetti v. Quarterman*, 551 U.S. 930, 949 (2007) (quoting *Ford v. Wainwright*, 477 U.S. 399, 426 (1986) (Powell, J., concurring)). Such a showing should not be onerous to make, and the quantum of proof need not be great. A plaintiff should be required to offer substantial evidence that because of a medical or other condition present through no fault of his own, the State's execution protocol would produce a high risk of extreme pain relative to that experienced by a healthy inmate. Upon a substantial showing of entitlement to relief, the "fair hearing" must, as a matter of due process, include, at a minimum, the adversarial presentation of evidence, argument from opposing parties, and factfinding on the record. *Id.*

The Federal Rules of Civil Procedure and Rules of Evidence provide sound (and generally controlling) guidance. *Compare Gonzalez v. Crosby*, 545 U.S. 524, 529 (2005) (noting AEDPA supplanted some Rules of Civil Procedure for purposes of habeas corpus cases) *with Hill v. McDonough*, 547 U.S. 573, 582 (2006)

(noting that 42 U.S.C. §1983 does not impose pleading requirements beyond those in the federal rules). Courts should be reluctant to depart from them.

Discovery should be readily available, and the appellate courts should not engage in ad hoc fact finding, a task they are ill equipped to undertake. Courts must be made to take seriously and consider with care claims that an inmate's unique medical condition will render an otherwise valid execution protocol tortuous.

Not being forced to make this assessment under the often-compressed timetable of a looming execution will reduce this risk. A substantial threshold showing, if made within a reasonable period after an execution warrant is issued, should also entitle an inmate to a stay of execution. *Hill*, 547 U.S. at 584; *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004). Providing a stay will alleviate the chaos and highly time-pressured filings that are all too often characteristic of the process in as-applied lethal injection cases.

The State may complain, as they have here, that an as-applied challenge has not been raised in a timely fashion. However, an as-applied challenge to a lethal injection protocol is often not ripe until an execution warrant is issued. *Accord Panetti*, 551 U.S. at 943. States often change protocols, making it difficult to know which protocol will be in place at the time of any given execution. *See, e.g.*, Death Penalty Info. Ctr., *Nevada Announces New Drug Protocol Eight Days Before Scheduled Execution* (July 5, 2018). And an inmate's medical condition, like his mental status, is not static. A new diagnosis or a deterioration in condition could warrant further factual development.

A stay should also readily issue if a state has also only recently adopted a new or altered protocol responsive to problems. Not providing some time for review and testing of a protocol poses a risk that an inmate would be executed despite a substantial risk of extreme pain in light of his particular medical condition. In apparent recognition of this concern, at least one state has agreed to withdraw any pending warrants if there is a change to the protocol. Stipulated Settlement, *First Amendment Coalition of Ariz., Inc., et al. v. Ryan, et al.*, No. 2:14-cv-01447-NVW-JFM (ECF 186) (June 21, 2017).

The goal is to let our judicial system work. When the litigants are able to equally and fully make use of the fact finding tools it provides, the truth emerges and justice is served. Sometimes delaying an execution will be necessary to let these processes play out. But these are in rare cases, involving prisoners with unique and substantiated medical conditions. Where a plaintiff has made a substantial threshold showing, a full and fair hearing should be provided.

B. The Alternative Method Requirement Has No Place In As-Applied Challenges.

The Court has not addressed whether naming an alternative method of execution is required in as-applied challenges to methods of execution. *See Glossip*, 135 S. Ct. at 2733 (discussing facial challenge to protocol). There are several reasons for not imposing such a requirement in as-applied challenges. The rationale for the requirement—to avoid allowing a facial challenge to a method of execution to function as an attack on the death penalty itself—simply does not apply to as-applied challenges.

As-applied challenges are necessarily about the unique circumstances of the persons making them and pose no risk of bringing executions to a halt more broadly. Perhaps the most probative evidence of this reality is that five persons have been executed in the time since the Court accepted review in this case. Death Penalty Info. Ctr., *Execution Database* (showing five executions between April 30, 2018 and July 18, 2018) available at https://deathpenaltyinfo.org/views-executions.

Without access to the courts' tools for discovery, it would be unfair to require that prisoners in as-applied challenges propose an alternative method. At the complaint-filing stage, the inmate will lack information critical to meaningfully asserting alternatives. They will not know how much the medical team knows about their condition, what accommodations the state is able and planning to make in light of the condition, and information about the team members and equipment that will be used in the execution.

The information imbalance is exacerbated by the state secrecy laws and practices that have proliferated in the context of executions. States have made their drug suppliers literal state secrets. States keep the curtains drawn during executions, and the identities and qualifications of execution team members are often not public information. *See, e.g.*, Mo. Rev. Stat. 546.720(2)-(3) (2007) (prohibiting disclosure of the identity of any execution team member); Ark. Code § 5-4-617(D)(h)-(i) (2015) (exempting information pertaining to execution procedures and team members from state public disclosure laws); La. Rev. Stat. Ann. § 15:570(G) (2012) (amended 2014) (prohibiting disclosure of information about the

identity of execution team members, including the identities of persons and documents that could lead to the determination of the identities of the team members); Okla. Stat. § 22-1015(B) (2014) (making confidential and exempt from discovery in any judicial proceeding the "identity of all persons who participate in or administer the execution process and persons who supply the drugs, medical supplies or medical equipment for the execution" as well as any information related to the drug purchases). Where the source of the risk of suffering is related to non-public information, it is unfair to require a plaintiff to name an alternative method.

Requiring instead, as we propose, the State to present evidence of alternatives and accommodations in an evidentiary hearing on the risk the execution would pose would serve dual goals: It would provide a level playing field whereby the party with the information relevant to the availability of alternatives is the party tasked with asserting them. It would also allow states to clear this obstacle to execution by addressing the problem asserted by the plaintiff.

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Our proposals are premised on a level playing field. Inmates and their counsel must be provided with the procedural protections and tools necessary to develop and present their case for relief. The one-sided fact development, lack of access to counsel, and unresponsiveness to serious concerns about the risks posed in light of an inmate's medical condition have distorted both the process and the reliability of the outcomes in challenges to lethal injection protocols. Courts should provide robust procedural protections

in these cases to ensure that inmates' claims are fully and fairly heard.

CONCLUSION

The judgment of the court below should be reversed.

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